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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision : May 20, 2016

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CRL.A. 100/2015

SHAHEED

..... Appellant

Represented by: Ms.Arundhati Katju, Advocate with
Mr.Himanshu Suman, Advocate

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP with SI Raj
Kumar, PS Neb Sarai

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

PRADEEP NANDRAJOG, J. (Oral)

CrI.M.B.No.358/2016

The application seeking suspension of sentence is listed for hearing on May 24, 2016. But the appeal has reached for hearing and thus the application is dismissed.

CrI.A.No.100/2015

1. Shaheed has been convicted for the offence punishable under Section 304-II IPC and has been sentenced to undergo RI for 7 years and pay fine in sum of ₹10,000/-, in default to undergo simple imprisonment for 1 year.
2. The case of the prosecution would rest on the testimony of Ms.Aisha PW-7, the wife of the deceased and that of Sonu PW-11, the nephew of the deceased. Aisha claims to be an eye witness.

3. As per her testimony she and her husband were running a tea stall at their residence and at 7:00 PM on October 23, 2012 her husband was inside the shop and she was outside preparing food. Three boys Shaheed, Maharaj and the third also named Shaheed (the appellant) were inside the shop. Her husband was struck with a hammer and the three boys fled. Identifying the appellant who, was the sole accused tried because the other two absconded and could not be arrested, she said that the appellant was the one who struck the hammer blow. She said that there were three other boys named Salam, Zaidul and Haroon who were present but the police did not record their statements.

4. Sonu PW-11 said that when he was inside the bathroom of his house, at around 6:30 PM on October 23, 2012 he heard cries of PW-7 from her house which was one house away from his. As he came out he saw three boys running and when he went to PW-7's shop he saw his uncle injured with blood oozing from his head. Pointing out to the appellant he said that appellant was one of the three boys whom he saw running away.

5. Finding corroboration to the testimony of PW-7 from that of PW-11, that three boys, one of whom was the appellant, ran away from the shop and finding no infirmity in the testimony of PW-7 the learned Trial Judge has returned the verdict of guilt.

6. But, unfortunately, the learned Trial Judge has not considered whether PW-7 could at all have seen the actual assault which took place for a reason unknown. As per her testimony three boys named Shaheed, Maharaj and the third also named Shaheed (the appellant) came to the shop of her husband when she was cooking food outside and she saw the appellant strike a blow on her husband's head with a hammer. She does not say that the three boys

came armed with a hammer. It appears that the hammer was lying in the shop. Her testimony certainly establishes, to which there is corroboration, that three boys came to the shop of her husband, and one of whom was the appellant. But, the rough site plan prepared by the investigation officer - and I find that no site plan to scale has not been drawn up - completely probabalizes that PW-7 could have seen the assault. The site plan shows that there is a door which leads from the courtyard, within the precincts of the plot having three rooms on the side, to the room from where the merchandise was sold. The door, approximately of 2½ feet width (and this I get from the photographs of the site Ex.PW-8/A1 to Ex.PW-8/A5) is the only means of egress and ingress to the shop. The site plan does not indicate the spot where PW-7 was standing and saw the assault. The blood on the counter of the shop, which I can see in the photographs, suggests that the deceased was struck with a blow by the hammer somewhere near the counter. Not showing in the site plan the place from where PW-7 could have witnessed the assault is a serious omission in the facts of the instant case and keeping in view the photographs, the rough site plan to scale assumes importance because there is no window on the wall of the shop and thus the only opening from within the precincts of the premises to the shop being the door a person outside had hardly a direct line of vision to the spot where the deceased was hit.

7. It would therefore be a case where evidence establishes that three boys, one of whom was the appellant came to the shop of the deceased and one of them hit the deceased on his head; a single blow was struck. There was no quarrel preceding the assault. No witness has spoken of that. No motive has surfaced. Therefore, curiosity of PW-7 who was the inhabitant

in the house was not aroused making her rush to the shop. With speed of lightening a blow was struck, but by whom is difficult to ascertain. The prosecution has not laid the charge for a premeditated assault.

8. The appellant would therefore be entitled to the benefit of doubt because the mandate which the society has given to a Judge i.e. the rule of presumption of innocence, is in criminal law known as **Blackstone's ratio** : *'It is better that ten guilty persons escape than that one innocent suffer'*.

9. A somewhat comparable situation had arisen in the decision reported as AIR 1953 SC 420 Ramnath Madho Prashad & Ors. Vs. State of Madhya Pradesh. Four people, held proved present at the spot, when the fatal shot was fired from a firearm and there being no proof of conspiracy, in paragraph 18, the Supreme Court held:-

"18. . . . Even if it is held proved that all the appellants were seen at that spot at the time of firing this fact by itself could not be held enough to prove a common intention of the appellants to murder Sunder. It can well be that these four persons were standing together and one of them suddenly seeing Sunder fired at him. This possibility has not been eliminated by any evidence on the record. In such a situation when it would not be known who fired the fatal shot none of such persons could be convicted of murder under Section 302, IPC. It seems to us that in this case the High Court failed to appreciate the true effect of the decision of the Privy Council in – 'Mahbub Shah Vs. Emperor', AIR 1945 PC 118 (A), and its judgment in regard to the applicability of S.34, IPC has to be reversed."

10. A comparable situation could be found in the decision reported as (1972) 42 AWR 866 Smt.Amna & Anr vs. State. In said case, an illegitimate child was born to appellant Amna on February 07, 1968. Appellant Amna

was living in a quarter with her mother Banoo, father, younger brother, uncle and grandfather. It was claimed by the prosecution that few hours after his birth, the dead body of the infant was recovered from inside a room of the quarter where Amna was residing, at instance of her mother Banoo. Amna and her mother were convicted for the offence of the murder of the infant. In appeal, the Division Bench of the Allahabad High Court acquitted Amna and Banoo essentially on the ground that it cannot be conclusively held that Amna and Banoo committed murder of infant when there were other occupants in the quarter wherefrom the dead body of the infant was recovered and who had not only the opportunity to murder the infant but the equally strong motive as the appellants had to do away with the infant. It would be pertinent to note following observations made by the Court:-

"11. We have carefully considered the circumstances on which reliance had been placed by the learned Judge in recording conviction on the charge of murder against the two Appellants. It was no doubt true that Smt. Amna gave birth to an illegitimate child and there was, therefore, a strong motive to do away with the child. It has, however, to be borne in mind that this motive was not confined to the two Appellants. Every member of the family must have felt the shame which Smt. Amna's indiscretion had brought upon the family and they must have shared the same strong motive to do away with the illegitimate child, It is clear from the statement of Smt. Ram Devi that, apart from the Appellants, Latif (father) and Gafoor (Grandfather) of Smt. Amna resided in the same quarter. Shabir, a brother of Latif, also resided there. Besides these adult members; there were younger brothers of Latif who lived in the same quarter with the Appellants. Latif was working as a bearer in the Aligarh University and Shabir plied a Rickshaw in Aligarh. The time gap between the birth of the child and the recovery of her

dead body was about eight or nine hours. The possibility of the adult male members of the family visiting the house during this period and murdering the child could not be ruled out. In a case where the same motive is shared by several members of the family, apart from the accused and where others had an opportunity of committing the crime, the circumstance that the accused had a strong motive could not safely be relied upon to fasten the guilt on the accused. The fact that at the time of the birth of the child and at the time of the recovery of the dead body no male members were present in the house could not lead to the inference that the crime must have been committed by those who were present on those two occasions, which happened after a long interval during which other members of the family must have, in all probability, visited the house and could have had an opportunity to commit the murder."

11. The decision was not interdicted by the Supreme Court as the petition seeking Special Leave to Appeal there against was dismissed.
12. The appeal is allowed.
13. The appellant is acquitted of the charge framed against him. His conviction and order on sentence are set aside.
14. The appellant be set free forthwith if not required in some other case.
15. TCR be returned.
16. Copy of this order be supplied to the Superintendent Central Jail Tihar for his record.

(PRADEEP NANDRAJOG)
JUDGE

MAY 20, 2016
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